Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning	)	DA 91-577
Regulation of Satellite	)	45-DSS-MISC-93
Earth Stations	)	

REPLY COMMENTS OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA

Pursuant to the Notice of Proposed Rulemaking ("NPRM") released by the Commission on May 15, 1995, in the above-captioned proceeding, the Satellite Broadcasting and Communications Association of America ("SBCA") hereby submits these Reply Comments.

I. THE COMMENTS FILED BY STATE AND LOCAL GOVERNMENTS

The comments filed by state and local governments in this proceeding demonstrate the scope and magnitude of the problems that have resulted from the arbitrary application of many local zoning ordinances to satellite antennas. Some of the entities opposing the NPRM attempt to dismiss all evidence of problems as exaggerated; yet these same commenters dramatically exaggerate the impact of the NPRM, claiming, among other things, that the Commission has proposed to preempt all local zoning regulation. Other state and local commenters agree with certain portions of the NPRM and concede (intentionally or otherwise) the scope and magnitude of the problems that have arisen since the Commission's

1986 Preemption Order.[1] Together these comments thus reinforce the need for the Commission to stay the course and tighten the 1986 Preemption Order.

There is no basis for the state and local commenters' criticism that the industry's evidence of the problems encountered by satellite antenna owners (and prospective owners) is isolated and merely anecdotal.[2] The problems are clearly *not* isolated. While specific examples were provided to demonstrate the various types of problems that satellite owners have encountered, a wide range of commenters documented a large number of different examples of such problems. These examples are merely the "tip of the iceberg." Moreover, during the many years the Commission has been reviewing the overall zoning issue, the Commission has been presented with a multitude of other examples of the disparate treatment afforded satellite owners by local zoning boards.[3] All told, however, the examples presented to the Commission represent but a small percentage of the total number of cases

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[1] *Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5519 (1986) ("1986 Preemption Order").

[2] *See* Comments of Duncan, Weinberg, Miller & Pembroke, P.C. at 2 ("any evidence of municipalities inhibiting access to satellite services is isolated and aberrational"); Michigan and Texas Communities' Initial Comments at 7 ("the proposed Rulemaking goes too [sic] an extreme to address a 'problem' that may have existed, if at all, in only a handful of situations"); Comments of the Cities of Dallas, Texas, *et al.* at 7-8 ("anecdotes submitted by industry groups. . . suggest that the industry has magnified the problem in an effort to relieve themselves of legitimate local regulation"). Duncan, Weinberg, Miller & Pembroke, P.C. represent approximately 100 state and local government entities in more than 12 states. The Michigan and Texas Communities are comprised of approximately 50 cities, townships and villages. The comments of the City of Dallas speak for 15 Texas cities as well as the National League of Cities, which represents more than 16,000 cities and towns nationwide, and the National Association of Counties, which represents approximately 2,000 counties nationwide.

[3] Satellite Broadcasting and Communications Association of America Petition for Declaratory Ruling Clarifying the FCC's Preemption of Local Zoning Ordinances that Discriminate Against Home Satellite Earth Stations, and Instituting Procedural Reforms (Apr. 16, 1991); Petition of Hughes Network Systems, Inc. For Declaratory Relief (Apr. 19, 1993); Petition of Hughes Network Systems, Inc. to Have an Ordinance of Coconut Creek, Florida Preempted by § 25.104 of Commission Rules, No. 120-SAT-DR-95 (June 22, 1995); Petition of Hughes Network Systems, Inc. to Have an Ordinance of Coral Gables, Florida Preempted by § 25.104 of Commission Rules, No. 132-SAT-DR-95 (July 10, 1995); Petition of Hughes Network Systems, Inc. to Have an Ordinance of Greenburgh, New York Preempted by § 25.104 of Commission Rules, No. 134-SAT-DR-95 (Aug. 3, 1995).

across the nation in which a homeowner's attempt to install a satellite dish has been hamstrung by a local government. The cases brought to the Commission's attention comprise the relatively few examples where the aggrieved antenna owner had the fortitude, money and time to devote to fighting the ordinance at issue to the bitter end, and thus the small percentage of problems that have risen to the attention of the large companies and national associations filing comments in this proceeding. For each of these examples, hundreds of other prospective antenna owners no doubt chose simply not to fight the ordinance but to forget about trying to obtain a satellite antenna — and the communications signals it would bring.

Simply stated, the satellite industry has not exaggerated problems faced by prospective satellite antenna owners. Indeed, it is somewhat ironic that many of the state and local commenters who make this accusation dramatically exaggerate the impact of the Commission's proposals by suggesting that the Commission is seeking to preempt all local zoning in its entirety.[4] As the Commission is well aware, the NPRM does not propose that the local zoning ordinances be flatly preempted. Rather, the NPRM provides for a balancing test for most antennas, pursuant to which only those ordinances that substantially limit reception or impose substantial costs will be preempted, and, even then, only if the locality cannot justify the ordinance at issue as reasonable in relation to the local interest and the

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[4] *See* Michigan and Texas Communities' Initial Comments at 5, 14 , 17, 21 ("[t]he proposed rule appears to exempt satellite dish antenna installation and construction from the application of local building and construction codes"; also referring to the "FCC's proposed decision to effectuate a blanket preemption policy"; stating that "[t]he proposed rule will kill people" and that it "grants satellite users virtual carte blanche to erect a dish at any location they choose"); Comments of the Cities of Dallas, Texas, *et al.* at 4, 5 ("[w]ithout zoning, building, electric and safety codes, disorder and danger would rule our cities"; "[i]t is a unique and short-sighted industry which proposes to ignore regulations indisputably related to public health and safety").

federal interests.[5] This proposal is thus a far cry from a blanket preemption. To the contrary, it is very sensitive to the legitimate needs and interests of local communities — indeed, in SBCA's view, overly sensitive (as we explain in Section II below).

Many of the state and local commenters concede the widespread nature of the problems that have been encountered by prospective satellite owners and actually agree with the NPRM in the following respects.

First, most of the state and local commenters concede that the Commission does need to amend its rules to address the procedural problems following the *Deerfield* case.[6] The Commission's proposed change reasonably addresses and corrects those problems and should be adopted.

Second, while many of the state and local commenters have criticized the problems raised by the satellite industry as isolated (as discussed above), many of these same commenters explicitly or implicitly concede the scope of the problem. For example, one group of commenters notes that "[t]he number of cases [with local decisions adverse to antenna owners] will be enormous, and will increase as satellite antennas become more commonly used and new technologies become more readily available."[7] In other words, they concede that the problems faced by antenna owners are not and will not be "isolated." This same group further notes that most "local jurisdictions are unaware that their land use regulations and safety codes are subject to preemption by a federal agency. Not only are most

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5 SBCA has proposed a flat preemption rule for certain antennas in specified areas.

6 *Town of Deerfield, New York v. FCC*, 992 F.2d 420 (2d Cir. 1992). *See* Comments of Duncan, Weinberg, Miller & Pembroke, P.C. at 1-2; Comments of Cities of Dallas, Texas, *et al.* at 9.

7 Comments of Cities of Dallas, Texas, *et al.* at 6.

local jurisdictions presently unaware of the NPRM, they will be unaware of any Commission decisions resulting from its application."[8] This, of course, has been at the root of the problem with the 1986 Preemption Order. Local jurisdictions do not even bother to learn what the governing law is. Ignorance, however, is hardly an excuse for violating a federal rule or frustrating the policies for the rule. The solution, therefore, is not for the Commission to throw up its hands and concede the ruling hand to the local authorities. It needs to adopt a workable policy and then take steps to ensure that the local authorities, municipal governments and their counsel, satellite dealers, and all other participants in the industry are aware of and understand the Commission's decision.

Third, as discussed in Section II below, some of the state and local commenters explicitly support the Commission's general approach of establishing a presumption of preemption for smaller dishes.[9] (As explained below and in our initial comments, SBCA urges the Commission to go still further and preempt all small dishes except when waivers are obtained.)

In sum, the comments support the Commission's general proposals to correct the procedural problems with the proposed rule changes, to tighten the scope of the current preemption due to the widespread problems that have been encountered by prospective satellite owners, and to treat even more stringently local zoning regulations and other

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[8] *Id.* at 11.

[9] Comments of Duncan, Weinberg, Miller & Pembroke, P.C. at 11 (this general approach is "commendable, practical and reasonable").

restrictions that impede the installation of small dishes. The Commission should therefore be confident that its general approach in the NPRM is correct.

II. SEPARATE TREATMENT OF SMALLER ANTENNAS

As indicated in our initial comments, SBCA strongly urges the Commission to adopt a rule of preemption, rather than merely a presumption of preemption, for antennas of two meters or less in diameter in commercial or industrial areas and one meter or less in diameter in any area.[10] We have set forth in our initial comments the reasons for preempting local regulations pertaining to small dishes and do not repeat them here. If the Commission nonetheless determines that it will provide only for a presumption of preemption for such antennas, SBCA offers some suggestions for modification of the Commission's proposal. As proposed by the Commission, section (b) currently reads as follows:

> Any regulation covered by paragraph (a) of this section shall be presumed unreasonable if it affects the installation, maintenance, or use of: (1) a satellite receive-only antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by local land-use regulation; or (2) a satellite receive-only antenna that is one meter or less in diameter in any area.

The Commission should clarify in the text of the rule that satellite antennas of the sizes described in the specified areas are presumed lawful. This could be accomplished by adding the following after the phrase "presumed unreasonable": "and thus owner installation and use of the antennas described in this section shall be presumed lawful." In other words, individuals would be able to install and use such antennas unless and until a local authority

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[10] SBCA Comments at 30-32.

met its burden of rebutting the presumption at issue. This approach will prevent a local authority from preventing or delaying a satellite installation that is presumed lawful while it may (in a particular case) vainly attempt to rebut the established presumption.[11]

Thus, SBCA's proposed section (b) would read:

> Any regulation covered by paragraph (a) of this section shall be presumed unreasonable, and thus owner installation and use of the antennas described in this section shall be presumed lawful, if it affects the installation, maintenance, or use of: (1) a satellite receive-only antenna that is two meters or less in diameter, in any area where commercial or industrial uses are generally permitted by local land-use regulation; or (2) a satellite receive-only antenna that is one meter or less in diameter in any area.

If the Commission adopts the flat preemption urged by SBCA, proposed section (c) of the rule, which establishes the showing that a local authority must make to rebut a presumption established by proposed section (b), would be deleted (as explained in our initial comments). If the Commission retains merely a presumption of preemption, however, section (c) would be retained. SBCA has one suggestion for modification of proposed section (c), which currently reads as follows:

> Any presumption arising from paragraph (b) of this section may be rebutted upon a showing that the regulation in question (1) is necessary to accomplish a clearly defined and expressly stated health or safety objective; (2) is no more burdensome to satellite users than is necessary to achieve the health or safety objective; and (3) is specifically applicable to antennas of the class mentioned in paragraph (b).

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[11] Whether the Commission adopts a flat preemption (as SBCA urges) or a mere presumption, the Commission should add a third subsection to this rule that would cover satellite antennas "disguised" to look like unregulated items such as umbrellas or rocks. *See* SBCA Comments at 31.

SBCA would propose the addition of a fourth showing that a local authority must make to rebut a presumption. Specifically, the Commission should incorporate into the test for rebutting the presumption the weighing of the federal interest from the general rule (with the modifications to the federal interest as suggested in SBCA's initial comments). Unless the Commission requires a local authority to show that its objective is reasonable in relation to the strong federal interests, it would be easier for a local authority to rebut a presumption than it would be for it to meet the general rule under section (a).[12] Such a result would be incongruous.

III. INTERSTATE COMMERCE ISSUE

Both the City of Dallas and the Michigan and Texas Communities' comments attempt to raise issues regarding the legality of the Commission's proposed preemption in light of the limited power of the Congress to regulate pursuant to the commerce clause, as interpreted in the recent U.S. Supreme Court decision *U.S. v. Lopez*, 115 S.Ct. 1624 (1995).[13] Although it is far from clear in either set of comments precisely what commerce clause argument is being raised, it is patently clear that the regulation of satellite communications falls squarely within the permissible regulation of interstate commerce.

The Supreme Court has recognized that "the Commission [has] been given 'broad responsibilities' to regulate all aspects of interstate communication by wire or radio by

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[12] In addition, the Commission should clarify that the word "and" appears between clauses (2) and (3) of proposed section (c). While this word does appear in the proposed rule presented in the text of the NPRM, NPRM at ¶ 46, it does not appear in the proposed rule as printed in Appendix II of the NPRM.

[13] Comments of the Cities of Dallas, *et al.* at 16; Michigan and Texas Communities' Initial Comments at 10-12.

virtue of § 2(a) of the Communications Act of 1934. . . ."[14] Moreover, in the NPRM, the Commission itself recognized the "strong federal interest in facilitating the distribution of interstate satellite communications."[15] Quoting from the 1986 Preemption Order, the Commission stated:

> [T]he broad mandate of Section 1 of the Communications Act, 47 U.S.C. § 151, to make communications services available to all people of the United States and the numerous powers granted by Title III of the Act with respect to the establishment of a unified communications system establish the existence of a congressional objective in this area. More specifically, the recent amendment to the Communications Act, 47 U.S.C. § 705, creates certain rights to receive unscrambled and unmarketed signals. These statutory provisions establish a federal interest in assuring that the right to construct and use antennas to receive satellite delivered signals is not unreasonably restricted by local regulation.[16]

The broad federal power to regulate interstate communications — and, concomitantly, the authority to preempt local regulation that impedes the receipt of communications signals — remain fully intact after the recent *Lopez* decision. Indeed, in *Lopez*, the Court reaffirmed that "Congress' commerce authority includes the authority to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."[17] The local statute at issue in *Lopez* was a criminal statute governing the possession of a firearm in a school zone and the Court found that it had no substantial effect on interstate commerce. Those facts bear no relationship to those here, however, where

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[14] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984).

[15] NPRM at ¶ 3.

[16] *Id.*

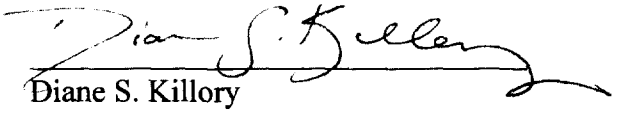
[17] *Lopez* at 1629-30 (citation omitted).

local zoning regulations have a very substantial impact on interstate commerce. The *Lopez* holding is, quite simply, inapposite here. The Commission therefore retains ample authority to preempt local regulations that interfere with the receipt by satellite of communications signals.

IV. CONCLUSION

The comments filed in this proceeding support the need to strengthen the current preemption rule and to change the procedures for obtaining FCC review. With the clarifications and modifications suggested by SBCA in our initial comments and in these Reply Comments, the new rule will fairly balance the needs of local authorities and prospective satellite antenna owners. We therefore urge the Commission to proceed expeditiously to adopt new rules that will speed the delivery of communications signals to prospective satellite owners.

Respectfully submitted,



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August 15, 1995

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